

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE

Assigned on Briefs April 1, 2008

IN THE MATTER OF E. B. H., JR.

**Appeal from the Juvenile Court for Davidson County
No. PT69879-2003-003256**

Betty Adams Green, Judge

No. M2007-02615-COA-R3-PT - Filed May 13, 2008

Father appeals the termination of his parental rights to his seventeen-year-old child. The trial court found that his rights should be terminated pursuant to Tenn. Code Ann. § 36-1-113(g)(6) due to the fact that Father was confined in prison as a result of a criminal act under a sentence of more than ten years imposed when the child was under eight years of age. The trial court also found that termination was in the child's best interests. Finding no error, we affirm.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Juvenile Court Affirmed

FRANK G. CLEMENT, JR., J., delivered the opinion of the court, in which PATRICIA J. COTTRELL, P.J., M.S., and RICHARD H. DINKINS, J., joined.

Laura A. Stewart, Nashville, Tennessee, for the appellant, E. B. H.

Robert E. Cooper, Jr., Attorney General and Reporter, and Amy T. McConnell, Assistant Attorney General, for the appellee, Tennessee Department of Children's Services.

Nick Perenich, Nashville, Tennessee, Guardian ad litem.

OPINION

E.B.H., Jr. (the child) was born on January 21, 1991. The child lived with both parents until 1995. In 1995, his father (Father) was arrested for armed burglary. Father was subsequently found guilty on two counts of felony aggravated robbery for which he was sentenced to two consecutive seventeen-year sentences. To aggravate matters further, the new offenses occurred while Father was on parole. The new offenses constituted a parole violation for the previous felony conviction, and the two seventeen year sentences were to run consecutive to the existing ten-year sentence.

As a consequence of the three convictions and lengthy sentences, Father has remained incarcerated since the child was four years old and will continue to be incarcerated well past the

child's eighteenth birthday. For the first two years of his incarceration, from 1995 to 1997, the child's mother brought the child to prison for visits; however, those visits stopped in 1997. The child did not see or talk to Father for the next seven years. It was not until the child went into state custody in 2004 that the child had any contact with Father.

In August of 2001, the child's mother sent the child to live with Wanda Martin. The child has lived with Ms. Martin ever since.¹ Although Mother provided some support and occasionally visited the child for the next four months, she stopped contacting or providing support for the child thereafter, leaving it up to Ms. Martin to support the child.

Two years later, on October 23, 2003, Ms. Martin filed a petition for custody of the child as a dependent and neglected child. Mother attended the hearing on Ms. Martin's petition. During the hearing Mother told the court she would test positive for marijuana. Following the hearing, the trial court removed the child from the legal custody of Mother and granted legal and physical custody to Ms. Martin.

Subsequently, Ms. Martin informed the State that she could no longer afford to financially support the child, at least not without assistance. As a consequence, on April 16, 2004, the child was placed in State custody due to Ms. Martin's inability to financially care for the child without assistance; however, the child remained in Ms. Martin's physical custody. Father was in attendance at this proceeding, having been transported by correctional officers. It was the first time Father had seen the child in seven years.

Thereafter, Father began requesting visitation and it was agreed that Father could have visits and phone calls. The trial court then ordered the child to participate in counseling. During one of the counseling sessions, the child, then fourteen years of age, informed the counselor that he did not want to visit Father. The counselor then submitted a report and recommendations to the court. After reviewing the counselor's report and recommendations, the court ruled that the child did not have to visit Father.

Four permanency plans were agreed to while the child was in the Department's custody.² The initial plan, dated June 1, 2004, had a goal of reunification with the option of placing the child with relatives. A second plan was implemented on March 7, 2005, which abandoned the goal of reunification and focused on the alternative goals of placing the child with relatives or adoption. A third plan with goals of planned permanent living arrangement or adoption was approved on March 23, 2006. The fourth and final plan was dated December 20, 2006, with the singular goal of adoption.

¹There is some confusion as to whether Ms. Martin is a paternal relative of the child or a family friend. This issue is irrelevant on appeal, and we decline to discuss it further.

²All permanency plans created were subsequently approved by the court.

The Department filed a petition to terminate the parental rights of both parents on April 11, 2007. The petition alleged termination of Father's parental rights was warranted on the ground of Father being sentenced to more than ten years imprisonment when the child was under eight years of age pursuant to Tenn. Code Ann. §36-1-113(g)(6).

A full evidentiary hearing on the petition was held on September 19, 2007, where Father was present and represented by counsel.³ Certified copies of Father's criminal judgments confirming the sentences and dates were introduced into evidence. At the conclusion of the hearing the trial court terminated Father's parental rights, and this appeal followed.

ANALYSIS

Parents have a fundamental right to the care, custody and control of their children. *Stanley v. Illinois*, 405 U.S. 645, 651 (1972); *Hawk v. Hawk*, 855 S.W.2d 573, 577 (Tenn. 1993). This right is superior to the claims of other persons and the government, yet it is not absolute. *In re S.L.A.*, 223 S.W.3d 295, 299 (Tenn. Ct. App. 2006).

Parental rights may be terminated only where a statutorily defined ground exists. Tenn. Code Ann. § 36-1-113(c)(1); *Jones v. Garrett*, 92 S.W.3d 835, 838 (Tenn. 2002); *In re M.W.A.*, 980 S.W.2d 620, 622 (Tenn. Ct. App. 1998). The petitioner has the burden of proving that there exists a statutory ground for termination, such as abandonment or failing to remedy persistent conditions that led to the removal of the child. Tenn. Code Ann. § 36-1-113(c)(1); *Jones*, 92 S.W.3d at 838. Only one ground need be proved, so long as that ground is proved by clear and convincing evidence.⁴ *See In re D.L.B.*, 118 S.W.3d 360, 367 (Tenn. 2003). In addition to proving one of the grounds for termination, the petitioner must prove that termination of parental rights is in the child's best interest. Tenn. Code Ann. § 36-1-113(c)(2); *In re F.R.R.*, 193 S.W.3d 528, 530 (Tenn. 2006); *In re A.W.*, 114 S.W.3d 541, 544 (Tenn. Ct. App. 2003); *In re C.W.W.*, 37 S.W.3d 467, 475-76 (Tenn. Ct. App. 2000) (holding a court may terminate a parent's parental rights if it finds by clear and convincing evidence that one of the statutory grounds for termination of parental rights has been established and that the termination of such rights is in the best interests of the child). Therefore,

³Mother failed to appear at the hearing on the petition, and her parental rights were terminated. She does not appeal the termination of her parental rights and is, therefore, not a party to this appeal.

⁴The clear and convincing evidence standard is a heightened burden of proof which serves to minimize the risk of erroneous decisions. *In re C.W.W.*, 37 S.W.3d 467, 474 (Tenn. Ct. App. 2000); *In re M.W.A.*, 980 S.W.2d 620, 622 (Tenn. Ct. App. 1998). Evidence satisfying this high standard produces a firm belief or conviction regarding the truth of facts sought to be established. *In re C.W.W.*, 37 S.W.3d at 474. It is more exacting than the preponderance of the evidence standard, *Santosky v. Kramer*, 455 U.S. 745, 766 (1982); *Rentenbach Eng'g Co. v. General Realty Ltd.*, 707 S.W.2d 524, 527 (Tenn. Ct. App. 1985), yet it does not require such certainty as the beyond a reasonable doubt standard. *Brandon v. Wright*, 838 S.W.2d 532, 536 (Tenn. Ct. App. 1992); *State v. Groves*, 735 S.W.2d 843, 846 (Tenn. Crim. App. 1987). Clear and convincing evidence eliminates any serious or substantial doubt concerning the correctness of the conclusions to be drawn from the evidence, *Hodges v. S.C. Toof & Co.*, 833 S.W.2d 896, 901 n.3 (Tenn. 1992), and it should produce a firm belief or conviction with regard to the truth of the allegations sought to be established. *In re Estate of Armstrong*, 859 S.W.2d 323, 328 (Tenn. Ct. App. 1993); *Brandon*, 838 S.W.2d at 536; *Wiltcher v. Bradley*, 708 S.W.2d 407, 411 (Tenn. Ct. App. 1985).

a court may terminate a person's parental rights if (1) the existence of at least one statutory ground is proved by clear and convincing evidence and (2) it is clearly and convincingly established that termination of the parent's rights is in the best interest of the child. Tenn. Code Ann. § 36-1-113(c); *In re Adoption of A.M.H.*, 215 S.W.3d 793, 810 (Tenn. 2007); *In re Valentine*, 79 S.W.3d 539, 546 (Tenn. 2002).

There have been varying descriptions of the standard of review this court is to apply when reviewing a trial court's decision in a termination of parental rights case. *In re B.T.*, No. M2007-01607-COA-R3-PT, 2008 WL 276012, at *2 (Tenn. Ct. App. Jan. 31, 2008) (no Tenn. R. App. P. 11 application filed). Our Supreme Court, however, recently indicated that the question of whether a statutory ground has been proved by the requisite standard of evidence is a question of law to be reviewed *de novo* with no presumption of correctness. *Id.* (citing *In re Adoption of A.M.H.*, 215 S.W.3d at 810). A similar standard was stated in *In re Valentine*, 79 S.W.3d at 546, wherein the Supreme Court stated that the question of substantial noncompliance with the requirements of a permanency plan was a question of law; therefore, it is reviewed *de novo* with no presumption of correctness. *Langschmidt v. Langschmidt*, 81 S.W.3d 741, 744-45 (Tenn. 2002).

The trial court found by clear and convincing evidence that Father's parental rights should be terminated pursuant to Tenn. Code Ann. § 36-1-113(g)(6) due to the fact that Father was confined in prison as a result of a criminal act under a sentence of more than ten years imposed when the child was under eight years of age. Father does not appeal this determination.

Having concluded that the Department established a ground for termination, and realizing that only one ground need be established, *see* Tenn. Code Ann. § 36-1-113(c)(1); *In re D.L.B.*, 118 S.W.3d 360, 367 (Tenn. 2003), the sole issue on appeal is whether the Department has established the second essential element, that being whether the termination of parental rights is in the child's best interests. *See* Tenn. Code Ann. § 36-1-113(c)(2).

In determining whether termination of parental rights is in the best interests of the child, the court shall consider, but is not limited to, the following:

- (1) Whether the parent or guardian has made such an adjustment of circumstance, conduct, or conditions as to make it safe and in the child's best interest to be in the home of the parent or guardian;
- (2) Whether the parent or guardian has failed to effect a lasting adjustment after reasonable efforts by available social services agencies for such duration of time that lasting adjustment does not reasonably appear possible;
- (3) Whether the parent or guardian has maintained regular visitation or other contact with the child;
- (4) Whether a meaningful relationship has otherwise been established between the parent or guardian and the child;

(5) The effect a change of caretakers and physical environment is likely to have on the child's emotional, psychological and medical condition;

(6) Whether the parent or guardian, or other person residing with the parent or guardian, has shown brutality, physical, sexual, emotional or psychological abuse, or neglect toward the child, or another child or adult in the family or household;

(7) Whether the physical environment of the parent's or guardian's home is healthy and safe, whether there is criminal activity in the home, or whether there is such use of alcohol or controlled substances as may render the parent or guardian consistently unable to care for the child in a safe and stable manner;

(8) Whether the parent's or guardian's mental and/or emotional status would be detrimental to the child or prevent the parent or guardian from effectively providing safe and stable care and supervision for the child; or

(9) Whether the parent or guardian has paid child support consistent with the child support guidelines promulgated by the department pursuant to § 36-5-101.

Tenn. Code Ann. § 36-1-113(i). The foregoing list is not exhaustive, and the statute does not require that every factor appear before a court can find that termination is in the child's best interests. *State v. L.H.*, No. M2007-00170-COA-R3-PT, 2007 WL 2471500, at *7 (Tenn. Ct. App. Aug. 31, 2007) (perm. app. denied Dec. 3, 2007) (citations omitted).

The trial court found that the Department proved by clear and convincing evidence that it was in the child's best interests to terminate Father's parental rights based upon the following findings:

(1) The father is unable to care for the child due to being incarcerated. He was eligible for parole this year, but it was denied. He had 2 disciplinary actions this year, both for fighting, and he admitted to numerous past disciplinary violations. His next parole hearing is in 2011, when the child will be 20 years old. It is certain that [Father] cannot care for [the child] during any of the remainder of his childhood.

(2) [Father] has not seen the child since he was 4 or 5 years old (other than 2 appearances in Court). [Father] has made attempts to have visitation, including asking the Court to order visitation after [the child] came into DCS custody. The court left it up to [the child] to determine if he wanted to see [Father]. Ms. Martin testified that she allowed [the child] to talk on the phone with [Father] if he wanted, and would have arranged visitation if [the child] had wanted visitation. She testified that if the termination is granted and she adopts [the child], she will allow [the child] to have contact with [Father]. The Court finds that Ms. Martin is a credible witness.

(3) Although [Father] made efforts after [the child] came into DCS custody, he did not make any efforts to see [the child] between 1997 and 2004. He believed [the child] was being cared for by [Mother]. She has virtually disappeared from his life.

(4) The child has been in the same home for approximately half of his life. . . . The father, through his criminal actions, also chose to leave [the child]. [Father] should be grateful that Ms. Martin has been a steady caregiver for [the child]. He should be grateful that she is willing to continue to care for [the child] and adopt him.

(5) [The child] has a deep bond with Ms. Martin. Although [Father] proposed a possible relative for [the child], that relative declined to be considered as a placement. Furthermore, to remove the child from a stable home where he is thriving would have a detrimental impact on his emotional health.

(6) The Court cannot find that there is a bond between [Father] and the minor child. There was approximately 7 years without any contact. In the last 3 years there has been very little contact. . . .The only meaningful bond [the child] has established is his bond with Ms. Martin.

(7) There was testimony as to whether [the child] wanted to be adopted by Ms. Martin. The casemanager and Ms. Martin testified that [the child] initially did not want to be adopted. However, he changed his mind. [The child] confirmed that it was his desire to be adopted by Ms. Martin.

(8) [Father has not] paid child support in accordance with the child support guidelines.

The record clearly and convincingly supports these findings. The child has been living in a caring and loving home with Ms. Martin for almost seven years. Conversely, Father has been incarcerated since the child was four, he has had essentially no contact and no relationship with the child since then, and he will remain incarcerated long past the child's eighteenth birthday. It is undisputed that Father had absolutely no contact with the child for seven years, and the child testified that he wished to be adopted by Ms. Martin, who is willing to do so.

Considering all of the above, we find the record clear and convincingly establishes the fact that it is in the child's best interests that Father's parental rights be terminated.

IN CONCLUSION

The judgment of the trial court is affirmed, and this matter is remanded with costs of appeal assessed against the Department of Children's Services due to Father's indigency.

FRANK G. CLEMENT, JR., JUDGE